LL Case No 126/1992

IN THE SUPREME COURT OF SOUTH AFRICA

APPELLATE DIVISION

In the matter between:

STANDS 5/1 WIERDA VALLEY
(PTY) LTD First Appellant

STANDS 6/1 WIERDA VALLEY
(PTY) LTD Second Appellant

and

THE TOWN COUNCIL OF SANDTON Respondent

CORAM: JOUBERT, VAN HEERDEN, NESTADT,
GOLDSTONE JJA et HOWIE AJA

HEARD: 13 SEPTEMBER 1993

DELIVERED: 27 SEPTEMBER 1993

JUDGMENT

VAN HEERDEN JA:

During 1987 a private company and a close corporation (hereinafter collectively referred to as the companies) were each the owner of a property situated within the municipal area of the respondent. Those properties were held subject to certain restrictive conditions and were zoned "Residential 1" in terms of the Sandton Town Planning Scheme ("the scheme"). Towards the end of 1987 the companies applied to the Administrator of the Transvaal for the removal of the restrictive conditions as well as an amendment of the scheme by a rezoning of the properties to "Business 4" as defined in the scheme. The application was made under s 2(1) of the Removal of Restrictions Act 84 of 1967 ("the Act") by one Jaspan on behalf of the companies. He was a partner of the firm of Rosmarin and Associates which specialised in town and regional planning.

During 1989 one of the properties was sold

and transferred by the private company to the first appellant, and the other by the close corporation to the second appellant. Subsequently the companies' application was granted under s 2(1) of the Act. Notice to this effect was given in the Provincial Gazette of 20 December 1989.

On 19 January 1990 the respondent sent two registered letters to Rosmarin and Associates. For present purposes the letters are identical and I therefore quote only the one relating to the property then registered in the name of the first appellant:

> "SANDTON AMENDMENT SCHEME NO. 1181 :
> PORTION 5 OF ERF 1 WIERDA VALLEY
>
> Your application dated 11 November 1987 in the above regard refers.
>
> As provided for in section 63 of the Town-planning and Townships Ordinance, 1986 the Owner is hereby requested to pay the following contributions towards external engineering services the particulars whereof are as follows:
>
> | | |
> |---|---|
> | Water | R6 137-82 |
> | Sewerage | R4 163-25 |
> | Roads | R38 064-00 |

Please note that the rights under this amendment scheme cannot be utilised until the above amounts have been paid in full."

The letters were received by the firm on 21 January 1990. Jaspan subsequently sent the letters to the companies and copies thereof to the appellants' holding company. The appellants, through their attorney, then took up the stance that neither of them was liable to pay to the respondent the sum of R48 365,07. However, in order to proceed with the development of the properties each appellant paid that amount under protest.

In March 1991 the appellants initiated motion proceedings against the respondent in the Transvaal Provincial Division. They sought an order declaring that the respondent was not entitled to any contribution as provided for in s 63 of the Town-Planning and Townships Ordinance 15 of 1986 (Transvaal) in consequence of the amendment of the scheme;

alternatively an order that the directives contained in the respondent's letters did not comply with the requirements of s 63. They also sought repayment of the amounts paid under protest, interest thereon and costs. That application, which was opposed by the respondent, was dismissed with costs by Hartzenberg J who subsequently granted the appellants leave to appeal to this court.

S 2(3) of the Act, as it read in 1989, provided as follows:

> "When a restriction or obligation which is binding on the owner of any land by virtue of a town-planning scheme is altered in terms of subsection (1), the provisions of any law on town-planning which is in force in the province in which the land is situate and which relates to the payment of a development contribution, as contemplated in that law, shall apply as if such alteration were an alteration of the town-planning scheme in terms of that law."

In so far as it is material s 63 of the 1986 Ordinance reads:

"(1) Where an amendment scheme which is an approved scheme came into operation in terms of section 58(1), the authorized local authority may, within a period of 30 days from the date of the commencement of the scheme, by registered letter direct the owner of land to which the scheme relates to pay a contribution to it in respect of the provision of -

(1) the engineering services contemplated in Chapter V where it will be necessary to enhance or improve such services as a result of the commencement of the amendment scheme;

(2) open spaces or parks where the commencement of the amendment scheme will bring about a higher residential density,

and it shall state in that letter -

(i) the amount of the contribution; (ii) particulars of the manner in which the amount of the contribution was determined; and (iii) the purpose for which the contribution is required."

The appellants' main contention, both in the court a quo and in this court, was that the phrase "development contribution as contemplated in that law" in s 2(3) of the Act does not include a

contribution as provided for in s 63(1) (a) of the 1986 Ordinance. The main thrust of this contention was that the expression "development contribution" relates to a tax imposed by a law on townplanning, and not to a contribution payable under such law for actual expenditure which will be incurred by a local authority because of the amendment of a townplanning scheme.

At the time of the passing of the Act s 51 of the Town-planning and Townships Ordinance 25 of 1965 (Transvaal) (since repealed) made provision for payment of a "development contribution". It prescribed that in the case of an amendment, of a town-planning scheme such a contribution was payable by the owner of the property and that the contribution had to be levied by the local authority concerned. The amount of the contribution was initially 50% of the difference between two appraisements or such

lesser percentage as the Administrator might determine. The appraisements had to reflect the value of the property immediately before and after the day on which an amendment scheme was approved by the Administrator (s 51(1), (2), (3) and (4)).

Reference should also be made to some other provisions of the 1965 Ordinance. In terms of s 50 any expenditure incurred by a local authority in connection with a townplanning scheme could be met from inter alia a development contribution and a townplanning fund referred to in section 52. 5 51(10) provided that a development contribution could, at the local authority's discretion, be used to defray expenditure contemplated in s 50, or for such other purposes as the Administrator might approve, or might be credited to a townplanning fund. S 52 in turn empowered a local authority to establish such a fund and to pay into it the whole or any

portion of a development contribution (s 52(1) and (2)). That fund had to be applied towards the preparation and implementation of a townplanning scheme.

Natal Ordinance 27 of 1949 made provision in s 62(1) for the recovery of "betterment" by a "responsible authority". It prescribed that where by the coming into operation of any provision in a townplanning scheme (which would have included a provision of an amended scheme) any property was increased in value, the "responsible authority" could recover from the owner of the property an amount not exceeding 75% of the extent of such increase. The expression "development contribution" did not appear in s 62, but s 70 provided that all sums received by a responsible authority by way of betterment had to be applied towards the discharge of any debt of that authority or for any purpose for which capital money

could be applied. The word "betterment" clearly denoted an amount payable under s 62(1).

When the Act was passed the Free State Ordinance relating to township and townplanning did not provide for the payment of a contribution as a result of the amendment of a townplanning scheme. But s 50 of the Townships Ordinance 33 of 1934 (Cape) stipulated for such a payment "[w]here by the coming into operation of any provision contained in a scheme . . . any property is increased in value ..." In such a case the local authority concerned was empowered to levy an amount not exceeding fifty percent of the amount of the increase in value. The 1934 Ordinance did not, however, make provision for an amendment of a townplanning scheme at the instance of the owner of a property governed by the scheme. In terms of s 45 an application for such an amendment had to be made by a local authority. (A new s 35 ter was inserted

into the 1934 Ordinance by s 4 of Ordinance 25 of 1969, but the former Ordinance was repealed by Ordinance 15 of 1985. For present purposes it suffices to say that the expression "development contribution" was introduced in the 1934 Ordinance only in 1969 but has not been incorporated in the 1985 Ordinance.)

It was common cause that the expression "development contribution" must be accorded the meaning it bore in 19 67 when the Act was passed: Finbro Furnishers (Pty) Ltd v Registrar of Deeds, Bloemfontein 1985 (4) SA 773 (A) 804D. At that date the expression occurred in only the 1965 Transvaal Ordinance. Since s 2(3) of the Act was clearly intended to apply to provisions regarding townplan-ning which were, or in the future might be, in force in any of the provinces, there is no justification for according the expression in the Act the meaning it bore in the 1965 Transvaal Ordinance merely

because the expression used in that Ordinance was repeated in the Act. That much was conceded by counsel for the appellant. However, he drew the following distinctions between, on the one hand, a development contribution and betterment as respectively provided for in the 1965 Transvaal and the Natal Ordinances and, on the other, the contribution ("engineering contribution") payable under the 1986 Transvaal Ordinance:

(1) A development contribution and betterment were related to an increase in value of the property concerned as a result of amended zoning rights, and not to an additional financial burden which might be incurred by a local authority pursuant to an exercise of those rights. An engineering contribution, however, is not levied in the interest of development generally, but represents the actual costs which the local authority will have to defray

when the amended rights are exploited.

(3) A development contribution and betterment did not have to be applied to defray such costs; the amounts concerned were on the contrary payable for the general weal of a townplanning scheme. By contrast the 1986 Ordinance by necessary implication provides that an engineering contribution must be used to meet those costs.

(4) In terms of s 63(2) of the 1986 Ordinance an owner, who wishes to avoid the payment of an engineering contribution levied by a local authority, may request the local authority to repeal the amendment scheme. Neither the 1965 Transvaal nor the Natal Ordinance, however, provided for an avoidance of payment of a development contribution or betterment.

In view of these distinctions counsel concluded that in contrast to an engineering contri-

bution a development contribution and betterment possessed all the characteristics of a tax. Hence the expression "development contribution" in s 2(3) of the Act must be construed as a contribution imposed by way of a tax or something analogous to a tax.

That expression does not have a technical legal meaning. For that matter, standing alone, it does not have an ordinary grammatical meaning. In the context in which it appears in s 2(3) of the Act, however, it relates prima facie to any contribution in relation to development which would have been payable in terms of a provincial law on townplanning if the amendment of a scheme had been effected under such a law.

I am prepared to assume that counsel for the appellant correctly contrasted a development contribution and betterment, payable under the 1965

Transvaal Ordinance and the Natal Ordinance, with an engineering contribution. I am also prepared to assume that the former were imposed by way of a tax. It does not follow, however, that the expression in s 2(3) of the Act should be restrictively construed so as to exclude an engineering contribution.

Generally the aim of an application for an amendment of a townplanning scheme is to develop the property in a manner not permitted by the existing scheme. Any such development may, of course, involve the local authority in additional expenditure relating to inter alia services to be provided for the development. Whilst it is true that contributions payable under the 1965 Transvaal Ordinance and the Natal Ordinance did not necessarily have to be applied so as to defray the cost of provision of such services, the provincial legislatures must have contemplated that as a rule the contributions (or

part thereof) would have been so applied. The reason why that was not prescribed was no doubt because it was realised that the amount of a contribution could exceed that cost. I therefore agree with the following dictum of Van Winsen J in Davies v Administrator, Cape Province 1973 (3) SA 804 (C) 812B-D (pertaining to s 35 ter of the 1934 Cape Ordinance):

> "Although Ord. 33 of 1934 contains no definition of 'development contribution' it would seem clear from the context of sec. 35 ter that it was intended to represent a sum of money to be paid by the owner of property beneficially affected, in this case by a re-zoning of his property, to the local authority in whose area the property was situate in order to alleviate in some measure the costs to be incurred by such authority in the supply of services to the property and other similarly advantaged."

It was no doubt because it was appreciated that the payment of a development contribution under the 1965 Transvaal Ordinance could prejudicially affect either the owner of the property or the local

authority concerned - because it could be more or less than the actual cost of inter alia the provision of additional services - that the relevant provisions of that Ordinance were not re-enacted in the 1986 Ordinance. What was the underlying purpose of those provisions therefore became the only purpose of the corresponding provisions of the latter Ordinance.

I agree with the court a quo that the object of the enactment of s 2(3) of the Act plainly was to prevent the situation where payment of a contribution could be avoided by an amendment of a townplanning scheme under the Act whereas it would have been payable had the application been granted under a provincial law. When adopting the expression in question the legislature therefore had in mind any contribution relating to development which would have to be made e g if a rezoning had taken place under a provincial law, no matter how that contribution falls

to be assessed. And since the 1986 Transvaal Ordinance does provide that such a contribution may be exacted after a rezoning has been granted, it quite clearly constitutes a development contribution for the purposes of s 2(3) of the Act. It would indeed be anomalous if in terms of that subsection a contribution could be exacted under the Natal and 1934 Cape Ordinances, as well as the 1965 Transvaal Ordinance, but not under the more equitable provisions of the 1986 Transvaal and 1985 Cape Ordinances.

In conclusion, on this aspect of the appeal, I should say that the legislative intent appears to me to be so clear that it is not permissible to have regard to an amendment of s 2(3) of the Act brought about by s 2 of Act 84 of 1991.

I consequently conclude that by virtue of s 2(3) of the Act an engineering contribution could be levied upon the appellants, and now turn to the

two grounds on which, in the appellants' submission, the respondent's directives of 19 January 1990 did not comply with the provisions of s 63(1) of the 1986 Transvaal Ordinance.

The first ground is that the directives were not sent to the appellants who at the relevant time were the owners of the properties, but to Rosmarin and Associates which firm was not authorised by the appellants to receive such directives on their behalf.

Now, should a local authority decide to levy an engineering contribution under the 1986 Ordinance, s 63(1) does, of course, enjoin that authority to direct the owner of the property concerned by registered letter to pay the contribution. The question therefore is whether the sending of the present directives to Rosmarin and Associates constituted compliance with that subsection.

Counsel for the appellants submitted that the phrase "the owner of land to which the scheme relates" in s 63(1) denotes the owner at the time when an amendment scheme comes into operation (either under s 58 of the Ordinance or under s 2(1) of the Act), whilst counsel for the respondent contended that the phrase has reference to the owner who submitted the application for amendment of the scheme. In support of his submission counsel for the appellant argued that on the day of coming into operation of the amended scheme an obligation to pay an engineering contribution arises, although it may only be quantified at a later stage, and that it is consequently the owner of the property at that stage who incurs that obligation. Hence, so it was also argued, the provincial legislature must have intended that in terms of s 63(1) a directive should be sent to the owner who became saddled with that liability.

This submission is unacceptable for the simple reason that no obligation arises when an amendment scheme comes into operation. It can only arise if the local authority decides to levy an engineering contribution and if a registered directive giving effect to that decision is posted within a period of 30 days from the date of commencement of such a scheme. Thus, no obligation will be incurred if the local authority decides not to - or forgets to - exact a contribution, or if for one reason or another fails to post the directive timeously.

There is accordingly merit in the view that the oft-mentioned phrase pertains to the. person who is the owner of the property when the directive is sent off by registered post. I find it unnecessary, however, to express a firm opinion on this point. For if the contention of the respondent should prevail, then it clearly complied with the requirement

of s 63(1) under discussion. And if the above view

is correct, there was, for the reasons that follow, also compliance with that requirement. I shall therefore assume, in favour of the appellant, that the "owner" for the purposes of s 63(1) is the owner at the time when the registered directive is posted.

S 63 does not provide that the owner of the property must be named in the registered letter or that it must be sent to a specified address. On the contrary, the local authority is merely enjoined to direct the owner - whomsoever he may be - to pay an engineering contribution (that is, if it decides to exact such a contribution). It is therefore not necessary to identify the owner in the letter - as was not done in the present case. The letter must, of course, be sent to an address. An application for a rezoning under either the Act or the 1986 Ordinance will in the nature of things emanate from the address

of either the owner of the property at that stage or his agent. Any letters pertaining to the application will thus also be sent by the local authority to that address unless it has been notified of a change of address. So, for instance, if a local authority wishes to obtain information from an owner under s 56(8)(b), or to consult with him under s 56(9)(a), it will as a matter of course send communications to the original or changed address. The provincial legislature must consequently have envisaged that, in the absence of such notification, the registered letter required by s 63(1) would be sent to the address from which the application emanated. (It may be that if a local authority has knowledge of a change of ownership of the property not derived from notice of a changed address, the registered letter may be sent to the new owner's address. It is, however, unnecessary to express a view on this

hypothesis.)

I am therefore of the opinion that unless a local authority has been notified of a change in address, and possibly unless it knows that a change of ownership has occurred, the directive required by s 63(1) may be sent to the address of the owner or his agent appearing in the application for rezoning. That this is the only sensible interpretation of the subsection is illustrated by the following. Unless some or other form of notification is received by the local authority, its townplanning (or engineering) department will as a rule be unaware of any change of ownership after the date of a rezoning application. That department will therefore naturally cause the registered letter to be sent to the only address of the "owner" known to it; i e the address appearing in the application.

Counsel for the appellant contended, how-

ever, that a local authority would have no difficulty in ascertaining the name and address of the owner of the property at the date of approval of the rezoning or of the posting of the registered directive. Such information, it was argued, could be gleaned from the local authority's rates records since under s 50(1) of the Local Government Ordinance 17 of 1939 (Transvaal) a clearance certificate must be obtained before transfer of property within a municipal area can be effected. There are at least two answers to this argument. Firstly, when applying for a clearance certificate an owner is not obliged to - and in practice probably will not - furnish the local authority with the name and address of the intended transferee. And even if he does, for one reason or another - such as cancellation of the underlying contract - transfer may never be given, or may only be given later than originally anticipated. Second-

ly, registration can take place between the date of approval of the rezoning and that of the decision to exact a contribution, or of the posting of the registered directive. The letter may even be sent off on the very day, and conceivably at the very moment, of registration of transfer. In some cases even a search in the deeds registry would therefore be of no practical assistance in determining who the registered owner of the property is when the directive is drafted or posted.

Counsel also contended that neither the Act nor the 1986 Ordinance provides that an application for rezoning must contain the address of the owner or his agent. That is true, but it is so highly unlikely that such an application would not emanate from a stated address that the legislature must have taken for granted that an applicant will supply an address.

27 In casu the applications were made by Jaspan on behalf of the then owners of the properties . They bore the address of the firm of which he was a partner. The directives were sent by registered letters to that address. In them the unnamed owners of the properties were directed to pay engineering contributions to the respondent. There is no suggestion that the respondent was aware of the fact that the properties had some time before been transferred to the appellants. In my view the respondent therefore did comply with the provision under discussion.

I come to the second ground upon which it was contended that the directive did not comply with s 63(1). It will be recalled that in a directive a local authority must state the amount of the contribution, particulars of the manner in which it was determined and the purpose for which it is required.

It will also be recalled that in each registered-letter the following information was given:

"Water	R6 137-82
Sewerage	R4 163-25
Roads	R38 064-00"

Counsel for the appellant submitted that that information was insufficient. A similar argument was raised in the appellant's heads of argument in the court a quo but not put forward during the oral address of counsel for the appellants.

Counsel for the respondent rightly pointed out that in their founding affidavit the appellants did not advance non-particularity as a ground for the invalidity of the directives. He therefore contended that the appellants were precluded from relying on that ground either in the court a quo or on appeal.

In my view this contention is well-founded. It is, of course, trite that an applicant may argue a point of law not raised in his papers but only if

its consideration does not involve unfairness to the respondent. Such unfairness will be absent if the point is one of pure law; i e a point in no way related to factual material which may not be contained in an applicant's or, for that matter, a respondent's papers. Now, particularity generally is a question of degree. Hence, unless one knows precisely how the amounts stated in the directives were made up, it may not be possible to ascertain whether the directives contained sufficient particularity of the manner in which those amounts were determined. Had the appellants relied upon a lack of particularity, the respondent would therefore have been entitled to show that it would have been quite impractical to incorporate in the directive something in the nature of a detailed bill of quantities, and that anything short of that would not have been of material assistance to the appellants. In sum, the

respondent may well have furnished information having a bearing on the meaning of "particulars" in s 63(1)(a)(i).

Counsel for the appellants countered, however, by contending that the point in question is indeed one of pure law. He argued that the directives were defective not because they contained insufficient particulars, but since no particulars whatsoever were stated. That being so, the directives, as a matter of law, were fatally defective.

I cannot agree. In each letter the respondent stated, albeit not explicitly, the amount of the contribution (R48 365,07) and the purposes for which it was required, viz, water, sewerage and roads. In breaking down the amount of R48 365,07 and allocating a portion thereof to each of the three purposes, the respondent in my view did to some extent at least give particulars of the manner in which that amount

was determined. This conclusion renders it unnecessary to consider whether the provision in question is peremptory or merely directory.

The appeal is dismissed with costs.

H J O VAN HEERDEN JA

JOUBERT JA

NESTADT JA

CONCUR

GOLDSTONE JA

HOWIE AJA